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MONTANA PROSECUTOR

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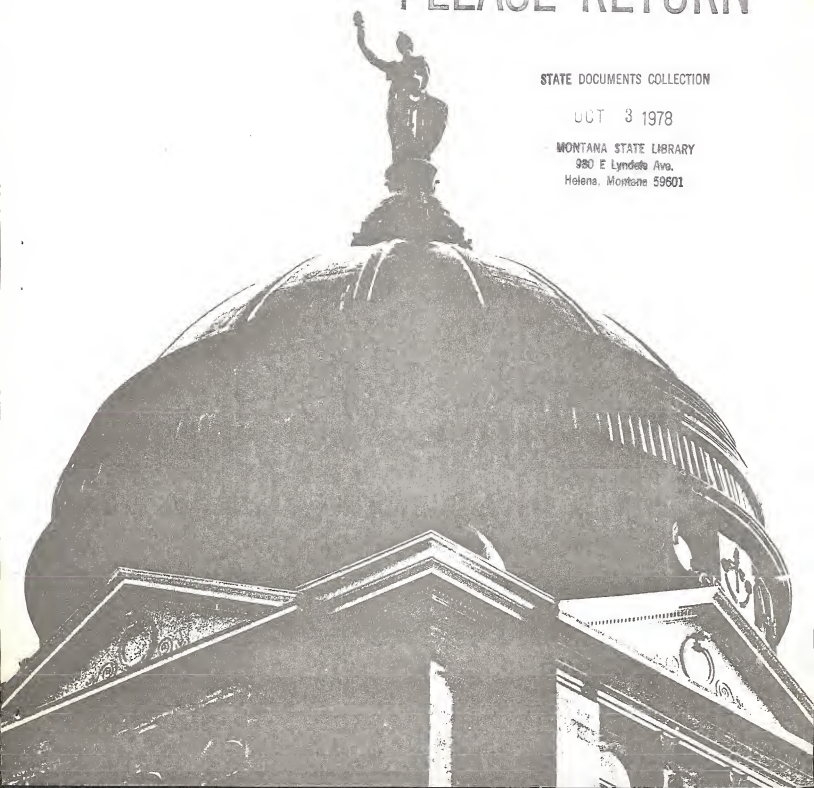
Vol. 2, No. 7

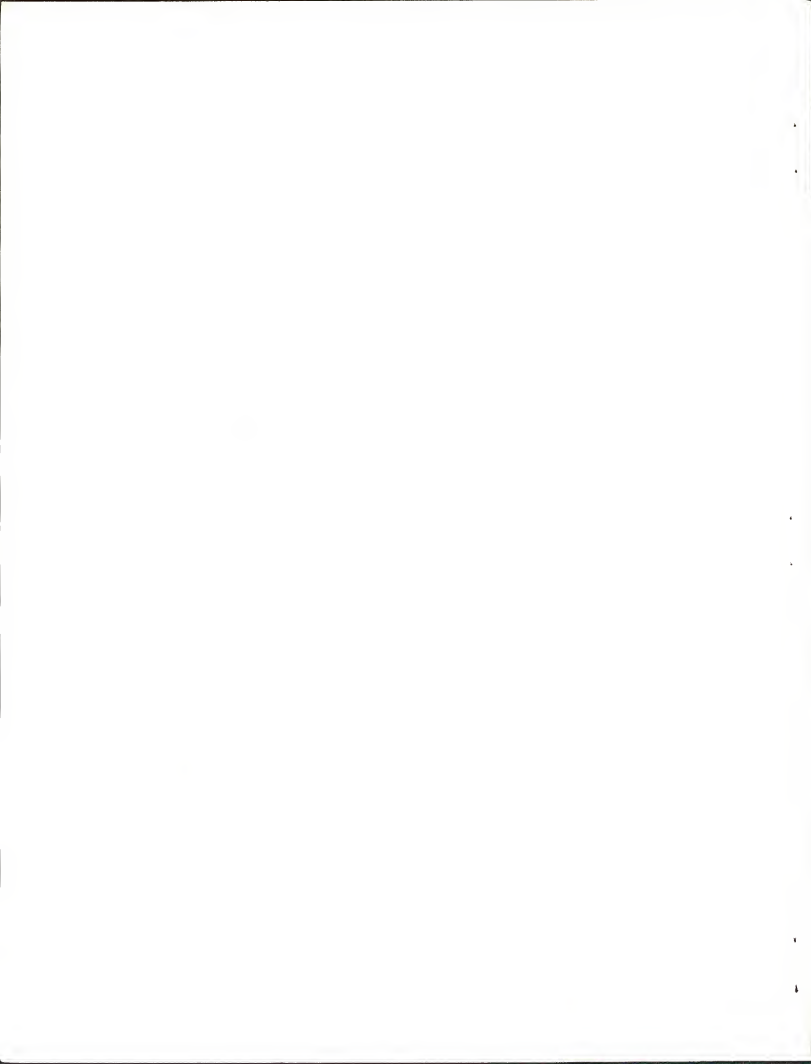
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INTRODUCTORY NOTES

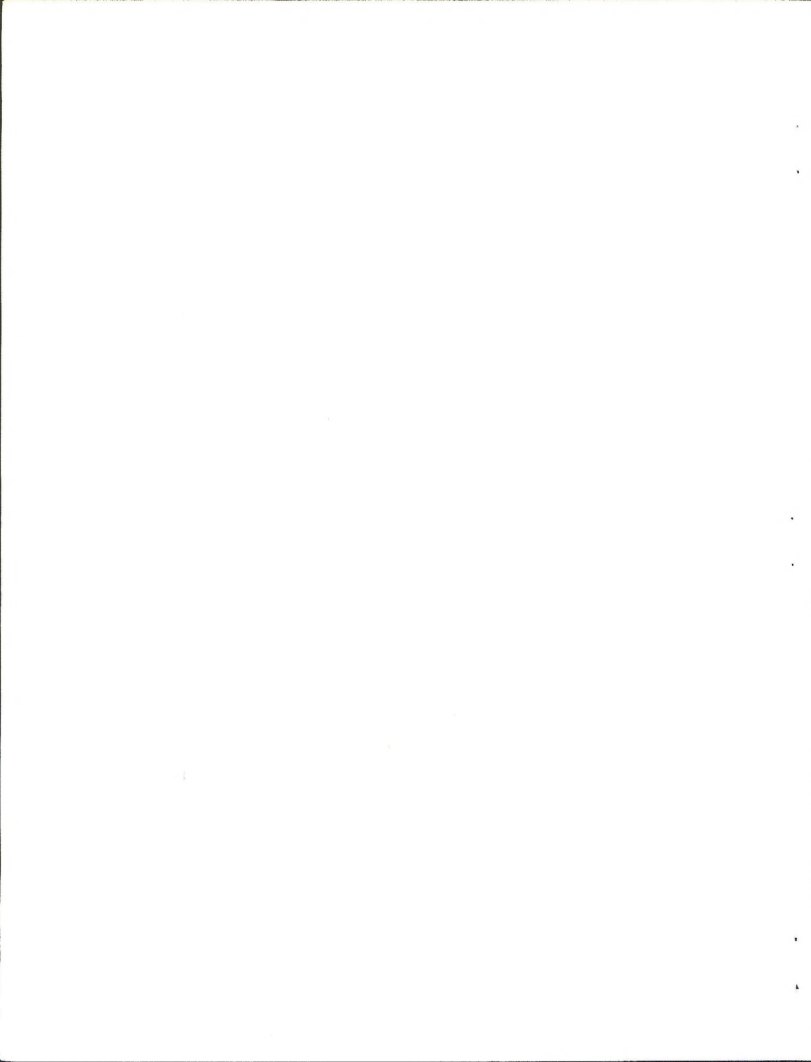
The Yukon Territory has extended enforcement reciprocity to Montana under Reciprocal Enforcement of Support Act provisions.

James A. Spall became a member of the County Prosecutor Services Bureau on September 1, 1978. Born and raised in Montana, Jim earned a B.A. in economics and political science at the University of Montana, and his J.D. at Willamette University. After graduation from Willamette, Jim began working for the Marion County District Attorney's office in Salem, Oregon where he remained until joining the CPS staff. During his years with the Marion County District Attorney's office, Jim received extensive trial and administrative experience. He is a welcome addition to the CPS program.

The legislative meeting for members of the Montana County Attorneys is still scheduled for November 9th and 10th, 1978 in Billings at the Warbonnet Inn. Enclosed is a reservation card for those who plan to attend the meeting. The reservation cards should be mailed by October 10, 1978 in order to assure adequate accommodations.

The Department of Justice is currently making plans for a training seminar in Billings on December 14th and 15th, 1978 at the Holiday Inn West. Tentatively, the training will focus on evidence in criminal cases, with emphasis being placed on the collection, preservation, presentation of evidence in addition to emphasizing the presentation of scientific evidence. As the details become available they will be made known to all prosecutors.

Arnold Melnikoff, Chief of the Criminal Investigation Laboratory, has informed us that the demands for laboratory assistance continue to increase at a geometric pace. The lab currently has a backlog of cases to prepare and the assistance of county attorneys is requested in an effort to alleviate part of the problem. State chemists are subpoenaed to testify in places all over the state of Montana. The more time they spend away from the lab, the larger their backlog becomes. As a result, it is requested that all county attorneys make an effort to minimize the number of times they secure the attendance of the state chemists to testify in criminal proceedings and to reduce, as best you can, the amount of time the chemist spends in your jurisdiction when subpoenaed. For instance, at times the chemists are subpoenaed, but are not called upon to testify. They also are subpoenaed, at times, for the first day of trial but do not testify until some time thereafter. Even though we are all aware of the scheduling problems associated with a criminal trial, by raising this problem we hope to be able to conserve the resources of the crime lab.



RECENT CASES AND NOTES

ELEMENTS

Telling defendant that in order for the court to accept the plea the defendant must have decided to kill the victim, then have done so without provocation, is sufficient advice that intent to kill is a necessary element of second degree murder. State v. Decoe (Ariz.) 578 P.2d 181

OBSTRUCTING JUSTICE

The crime of resisting arrest is a general intent crime, and does not change the statute into a specific intent crime. Refusing to give defendant's requested specific intent jury instruction was proper. State v. Mikels (Ariz.) 578 P.2d 714.

SELF-DEFENSE

Defendant's claim, that he attacked the arresting officer because he had asthma and the officer's mace was suffocating, while relevant to the obstruction justice charge, did not support a self-defense instruction. While the self-defense instruction must be given at the slightest evidence of self-defense, there was no support for it in the evidence. The defendant fled the scene, hid, and was not arrested until later. State v. Mikels (Ariz.) 578 P.2d 174.

ARGUMENT

Prosecutor's comment characterizing defendant as a "professional trafficker in drugs" was not unreasonable where defendant had four previous felony convictions for drug offenses. Rudolph v. Commonwealth (Ky.) 564 S.W.2d 1.

ARMED ROBBERY

The stabbing of a victim who had regained his wallet from defendant constituted armed robbery even though there was no second taking of the wallet. It could reasonably be found that the use of the knife was an attempt to re-steal the wallet. (It just wasn't the defendant's day -- after the victim was stabbed, instead of surrendering the wallet, the victim took the knife out of the wound and chased the defendant away.) State v. Riviera (Hawaii) 577 P.2d 793.

CONSPIRACY

A hugh conspiracy requires a lengthy but worthwhile opinion. Inter alia the case deals with Bruton, admitting tapes of conversations without proving chain of custody, liability of co-conspirators for others, using the mail when the co-conspirators did not know or approve of it, using a prosecutor to explain why immunity was granted, with favorable decisions on all issues. United States v. Craig (7th Cir.) 573 F.2d 455.

COUNSEL

A disagreement about trial tactics between a defendant and his attorney is not sufficient to require the court to replace the attorney at that time if trial has begun. State v. Jones (S.C.) 243 S.E.2d 461.

DISCLOSURE

Defendant not denied due process when the prosecutor did not disclose during plea negotiations that it had received information that complaining witness had died. The prosecutor has no ethical or legal obligation to reveal tactical weaknesses such as this in order to let a guilty person escape. People v. Jones (N.Y. Ct. of App.) 375 N.E.2d 41.

DISCOVERY - NOTES

Destruction of an agent's notes from which he produced his report was not grounds for a mistrial in United States v. Juarez (5th Cir.) 573 F.2d 267.

DWI

An officer, who saw defendant staggering while he walked, then observed defendant's car weaving slightly, had reasonable cause to make an investigatory stop, although the car was not violating any traffic ordinances and was not endangering anyone at the time of the stop. Gordon v. State (Alaska) 477 P.2d 701.

GUILTY PLEA

Guilty plea, obtained from defendant who was 4 1/2 months pregnant and desired to have abortion was the product of emotional pressure and therefore was not freely, understandingly and voluntarily made. People v. Torrence (Mich. App.) 265 N.W.2d 65.

INVITED ERROR

Even if a prosecutor's comment on the defendant's failure to take the stand was in response to a codefendant's argument, the comment was reversible error in defendant's case, since the defendant did not invite the error. State v. Reeves (Kan.) 577 P.2d 1175.

JURY INSTRUCTION - INTOXICATION

Defendant must be intoxicated to such an extent that he is utterly incapable of forming a specific intent to kill and there must be some evidence defendant was in such a state before an intoxication instruction should be given. State v. Medley (N.C.) 243 S.E.2d 374.

PRIVACY

Inmates of jails ordinarily have no reasonable expectation of privacy in jailhouse conversations, and even husband and wife communications cannot be deemed to have been made in confidence so as to raise the marital privilege. *People v. Smith* (App.) 145 Cal.Rptr. 443.

MIRANDA

Questions asked the only suspect in a prison stabbing about "What happened?" and "Why?" were not interrogatory within the meaning of *Miranda*, and therefore the answers were admissible despite no *Miranda* warnings. The questions were either preliminary or intended to aid in securing the prison area, rather than securing evidence. (Good analysis.) *State v. LaRue* (Wash.App.) 578 P.2d 66.

SEARCH & SEIZURE

Bloodstains in plain view on back seat of defendant's car gave officers probable cause to search the car following defendant's arrest in another location. Search might have been made either on the scene or at the station house without a warrant. *Redd v. State* (Ga.) 243 S.E.2d 16.

Defendant was convicted of carrying concealed weapon discovered in a courtroom search made at the direction of trial judge, prior to civil hearing in which defendant was a litigant. The judge had reliable information that defendant carried the weapon and therefore the search was made to preserve the safety of others in the courtroom. *State v. Shelton* (S.C.) 243 S.E.2d 455.

SENTENCE

Sentencing a defendant with a clean record to two years in prison for aggravated battery, (child abuse) solely to deter others from child abuse and to cause others to seek counseling is upheld here. The sentence was within the permissible range of sentence (3 years maximum). *State v. Adams* (Idaho) 577 P.2d 1123.

SENTENCE - LIES

Sentencing judge may properly consider the fact that defendant lied to the judge about defendant's involvement in the crime. The defendant's readiness to lie under oath is one of the more reliable indicia of the likelihood of rehabilitation. *State v. Carsten* (S.D.) 264 N.W.2d 707.

VOIR DIRE

Refusal to conduct additional voir dire after a 49 day delay between empaneling and the start of the trial, was grounds for a new trial. *United States v. Price* (5th Cir.) 573 F.2d 356.

ALIBI - INSTRUCTION

It was proper to refuse an alibi jury instruction where the defendant denied he was at the scene of the crime, but did not present evidence about where he was at the time of the crime. State v. Bailes (Ariz.) 578 P.2d 1011.

FIRST AMENDMENT

The First Amendment does not protect criminal activity, therefore defendant's conviction for offering to exert improper influence on a public official in return for something of value did not violate the First Amendment. State v. Jacobs (Ariz.) 579 P.2d 68.

HANDCUFFS - VOIR DIRE

The trial court's determination that some jurors seeing defendant being transported to court in handcuffs was cured by the voir dire is upheld in State v. Rocco (Ariz.) 579 P.2d 65.

HUSBAND-WIFE PRIVILEGE

The burden of proving that defendant and his mistress abandoned their illicit affair and entered the status of common-law marriage rests on defendant if he wants to claim the husband-wife privilege. Defendant failed to meet the burden where inter alia they intended to get married when they moved (but didn't) and the mistress filed her income tax returns in her own name. State v. Bailes (Ariz.) 578 P.2d 1011.

IDENTIFICATION

The victim's failure to pick defendant out of a photo lineup and his identification of defendant at a suggestive preliminary hearing were not grounds to exclude his in-court identification of defendant. Among the factors considered were that the victim's description clearly matched defendant with one explained exception and the victim was candid in admitting he wasn't certain. (Opinion contains language that a previous failure to identify should go to weight, not admissibility.) State v. Nieto (Ariz.) 578 P.2d 1032.

JURY QUESTIONS - WEAPONS

If the question of whether the weapon is deadly can be answered only one way, it is a matter of law, but if the answer depends on the nature and circumstances of the use of the weapon, it is a jury question. Here submitting the questions of whether a tire iron was a deadly weapon to the jury was correct. State v. Moss (Ariz.) 579 P.2d 42.

EVIDENCE - SENTENCE

Evidence obtained contrary to the Fourth Amendment may be used for sentencing purposes. State v. Banks (N.J.) 384 A.2d 1164.

ARGUMENT

Where seventy to eighty pounds of marijuana were found in defendant's possession, prosecutor's characterization of defendant as "professional druggie" was a reasonable inference from the evidence and did not require a mistrial. *Futch v. State* (Ga.App.) 243 S.E.2d 621 (1978).

ARREST

Proper to make a full custody arrest of a defendant who ran a stop sign on a bicycle, where defendant gave two separate birthdates and a name that was different than what his companion said defendant's name was. Officer's subjective reason for the stop (suspicious of contents of bag defendant carried) did not matter since there was an objective, albeit little used, reason for the stop. *State v. Johann* (Or.App.) 578 P.2d 810.

BREATHALYZER OPERATOR

A certified breathalyzer operator was not called as, nor statutorily required to be, an expert witness about the chemical or mechanical operation of a breathalyzer. Therefore, it was proper to sustain objections to technical questions about the machine and how the test worked. *State v. Winters* (Or.App.) 578 P.2d 439.

RAPE

A unique attempt to get inadmissible evidence of the victim's past sexual history into evidence, disguised as an attempt to find out whether or not the victim would know that she had been penetrated, was properly barred in *State v. Cook* (Kan.) 578 P.2d 257.

Imposition of life sentence for rape in first degree is constitutionally permissible. *Phipps v. State* (Md.Ct.Sp.App.) 385 A.2d 90.

VOLUNTARINESS OF STATEMENT

California refuses to follow the United States Supreme Court and upholds its rule that once the defendant has invoked *Miranda* he cannot be questioned again. The dissent labels the majority opinion a "shell game". *People v. Pettingill* (Cal.) 578 P.2d 108.

Defendant's statement to officer during a conversation while waiting in District Attorney's office was voluntary although *Miranda* rights were not given. Defendant was 29 years old, had previously been involved with police, and had initiated the inquiry leading to the statements. *Leach v. State* (Wis.) 265 N.W.2d 495.

U.S. SUP. CT. - THIRD PARTY EVIDENTIARY SEARCH NOT PROHIBITED BY FOURTH AMENDMENT

A 5-3 Supreme Court majority has concluded that a search for evidence reasonably believed to be on a third party's premises was allowable even though the third party was a newspaper and was not suspected of involvement in any crime. *Zurcher v. The Stanford Daily*, 23 Cr. L. 3061 (5-31-78).

U.S. SUP. CT. - MEDIA'S RIGHTS TO INSPECT JAILS NO GREATER THAN
GENERAL PUBLIC

A majority of the United States Supreme Court has held that when it comes to the inspection of penal facilities, the media possesses no greater rights than does the general public. *Houchins v. KQED, Inc.*, 23 Cr.L. 3164 (6-28-78).



"I object, Your Honor! My client has a right to be tried by a jury of his peers, and there's not a single burglar on it!"

CONSENT: VOLUNTARINESS; FACTORS TO CONSIDER

The mere fact that a number of police officers arrived at defendant's premises with their weapons drawn and pointed at the defendant, did not, as a matter of law, render defendant's consent to a search of the premises involuntary; by the same token, the mere fact that defendant stated that incriminatory evidence would be found during the search did not require a conclusion that his consent was involuntary. "...Factors such as the number of officers present, the degree to which they emphasized their authority, and the display of weapons are some of the items comprising the so-called "totality of the circumstances."...Appellant emphasizes the intital display of weapons by the police, as well as the number of officers present in his home, as constituting coercive factors. Yet, no single factor is ever determinative on the issue of consent, and the display of guns by the police though pertinent, is not conclusive...By the same token the number of officers present is not determinative, and the presence of a group of officers upon the premises does not by itself render the consent involuntary...These are factors which the court below was entitled to consider within the realm of the totality of the circumstances. We are unable to agree with the appellant that the factual situation here mandates a finding that appellant's consent was given involuntarily as a matter of law." *State v. Patterson*, 571 P.2d 745, (Hawaii, 1977).

STOP AND FRISK: POLICE "CONTACTS" v. "STOPS"

Where a police officer approached the defendant on the streets and asked, "Sir, may I talk to you a moment?", strongly suggesting that the defendant was free to leave if he so desired, and nothing in the defendant's response indicated the contrary and there was no physical force or physical contact of any kind used to restrain the defendant's freedom of movement, and where an innocent person in the defendant's position would not have felt compelled to respond affirmatively to the officer's request for information, this constituted a "contact", not a "stop". The latter, of course, must be grounded upon a reasonable suspicion, whereas the former requires absolutely no knowledge or information on the part of the police officer in order to initiate such a contact. As the Court, however, notes, it is frequently difficult to differentiate between a "stop" for Fourth Amendment purposes, and a legally inconsequential "contact". "As the police regulations concede,...,there can be no question that a 'stop' has occurred where physical force has been used to detain a person against his will, or the individual has been subjected to a 'frisk' for weapons...The difficulty comes in distinguishing between 'non-forceable stops,' i.e. stops effectuated through a show of authority without the use of force, and mere 'contacts'. In such situations, the crucial consideration is the one set forth in the police definition quoted above, whether the person was 'under a reasonable impression that he [was] not free to leave the officer's presence.' We would only add that in determining whether such a reasonable impression existed, the test must be 'what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes.'" United States v. Wylie, 569 F.2d 62, (D.C., 1977).

ARRESTS

While the rule against entering a private home to make an arrest without an arrest warrant applies to hotel rooms, the exception to the rule allowing an officer with probable cause and exigent circumstances to make a warrantless entry to arrest also applies to hotel rooms. The officer's entry of defendant's hotel room without an arrest warrant was therefore lawful when the officer smelled burned marijuana, knocked, and was refused admittance. State v. Decker, 580 P.2d 333.

Where defendant was arrested 30' - 50' from his pickup, handcuffed and put in the back of a patrol car, then his pickup was seized to transport contraband, driven four miles, then searched, the search was not justifiable as a search incident to his arrest. Brown v. superior Ct. of Cty. of Maricopa (Ariz.) 580 P.2d 343.

ENTRAPMENT

Defendant did not show entrapment, as a matter of law, where by his own testimony a third party, instead of the government, supplied the heroin that he bought. State v. Quinonez, 580 P.2d 346.

DOUBLE JEOPARDY JUVENILE

Double jeopardy boils down to the risk of conviction and a threat of successive prosecutions, so double jeopardy does not attach when a motion to revoke a juvenile's probation is dismissed. The juvenile has already been convicted, so he is not risking another conviction and the state can appeal the dismissal. Appeal in Maricopa County Juvenile Action, Etc., 580 P.2d 10.

FIFTH AMENDMENT

The defendant was not denied his privilege against self incrimination when the jury considered his failure to testify in finding him guilty. The fact that he did not like the inferences that could be drawn does not mean he was denied the right, clearly he exercised it. State v. Callahan, 580 P.2d 355.

HEARSAY - JUVENILE

Reliable evidence, including hearsay, is admissible in proceedings to revoke a juvenile's probation. Appeal in Maricopa County Juvenile Action, Etc., 580 P.2d 10.

INFORMANTS

Where the state knew the address of the material witness informant until after defendant asked for a continuance because he was going to plead guilty, the state attempted to relocate the informant when defendant reneged, and the state turned over everything it had on the informant, failure to produce the informant at trial was not error. State v. Quinonez, 580 P.2d 346.

LICENSE REVOCATION

A suspension of defendant's license after a DWI conviction but prior to the revocation hearing is constitutional, so defendant's conviction for driving on a revoked license is affirmed even though the arrest occurred during the prehearing suspension period. State v. Parra, 580 P.2d 339.

SEARCH & SEIZURE

The smell of burned marijuana coming from a room constitutes probable cause to believe the occupant possesses marijuana and indicates that the contraband is being destroyed, which is an exigent circumstance allowing a warrantless entry of the room. Further, in this case, the officer had knocked, announced himself, and been refused admittance. Clearly exigent circumstances validated his warrantless entry to arrest defendant and the marijuana in plain view was properly seized. State v. Decker (Ariz.) 580 P.2d 333.

DEATH PENALTY

Death penalty was proper sentence for defendant who was trigger man in robbery/rape where officer was murdered, the killing/robbery/rape were cold, calculated crimes committed in an atrocious, heinous and cruel manner. Raulerson v. State (Fla.) 358 So.2d 826.

SPEEDY TRIAL

Delay caused when defendant is in custody in another jurisdiction is excluded time. While there is a federal duty to secure the return of a defendant who is in custody elsewhere, the state has no duty to keep track of defendants out on bond, and the duty to secure defendant's return does not arise until the state knows defendant is in custody elsewhere. State v. Quinonez (Ariz.) 580 P.2d 346.

VOLUNTARINESS OF STATEMENTS

Failure to make a motion to suppress prior to trial and failure to object to admission of the statements during trial waived defendant's right to a voluntariness hearing, so it was not error for the State to use defendant's statements to impeach her without first holding a voluntariness hearing. State v. Ferguson (Ariz.) 580 P.2d 338.

ARRESTS

The arrest of co-conspirators who were carrying some of a load of marijuana constituted exigent circumstances validating the warrantless arrest of the rest of the co-conspirators in their homes, since the officers did not know the distribution schedule, and the failure of the first co-conspirators to show up might have resulted in the destruction of evidence, etc. U.S. v. Flickinger (9th Cir.) 573 F.2d 1359.

COMPETENCY

Medication may be administered without the consent of a defendant under compelling circumstances, including those where medication is necessary to render defendant competent to stand trial. Such necessity would constitute a compelling state interest justifying infringement upon the right to bodily integrity. State v. Law (S.C.) 244 S.E.2d 302.

COMPETENCY OF COUNSEL

Defendant, under two indictments for aggravated burglary, was informed by the defense attorney of state's offer of one to three years for both indictments but was not advised of the relative merits of this offer compared to his slim chances of acquittal and was subsequently sentenced to two consecutive terms of five to twenty years, was denied effective assistance of counsel. Commonwealth v. Napper (Pa.Supr.) 385 A.2d 521.

DRUGS & NARCOTICS

Possession of equipment used to weigh, cut, measure and distribute heroin is evidence of intent to distribute heroin, combined with an expert's testimony that 16 oz. was not normally for personal use, and defendant's admission he used spoons to put heroin in balloons constituted sufficient evidence to sustain defendant's conviction for possession with intent to distribute. United States v. Briscoe (8th Cir.) 574 F.2d 406.

EVIDENCE

Mention of shotgun and showing photograph depicting it prior to completion of proper foundation for its admission did not warrant mistrial since the state made no effort to offer it into evidence at that time. Mention of the shotgun was merely preliminary, the court cannot control the state's order of proof. State v. Robertson (La.) 358 So.2d 931.

IDENTIFICATION

Where there was no explicit in-court identification of defendant but where there was testimony from six witnesses who personally knew defendant and never protested that the man sitting at the defense table was not the defendant, the court held that the lack of any such witness protest and of any objection by defense counsel in this regard was sufficient to support a finding of identity. However, in the interest of absolute certainty, the court allowed the government to reopen its case to show identity. U.S. v. Fenster (E.D.Mic.) 449 F.Supp. 435.

INSTRUCTIONS

A jury instruction (contained in footnote) that anyone who unlawfully entered a building was presumed to enter with intent to commit a crime, unless he gave a satisfactory explanation, was held constitutional. State v. Bishop (Wash.) 580 P.2d 259.

MIRANDA

Where officers arriving at the scene of a shooting were met by defendant, who gave them his version, it was error for the court to suppress the statements because the officers had not given the defendant his Miranda warnings. The statements were part of the initial questioning and were admissible. People v. Conner (Colo.) 579 P.2d 1160.

MIRANDA - MEDICAL EXAMINER

Assuming that a coroner investigating a suspicious death has, under common law and statutory law, the same status as an investigating police officer, a coroner's interview with a suspect on whom the investigation has focused did not constitute custodial interrogation and thus did not require that Miranda warnings be given. Commonwealth v. Anderson, (Pa.Supr.) 385 A.2d 365.

MOTION IN LIMINE

A motion in limine is merely to red flag evidence so that counsel will not bring it up without consulting the judge, however, it is not a final order. Circumstances may change during trial. In any case the judge will have to make a factual basis for making the determination. The defendant's failure to offer evidence during trial, after the state's successful pretrial motion in limine, meant that the appellate court would not review the propriety of the motion in limine. State v. Landley (Iowa) 265 N.W.2d 718.

PROSECUTOR

The Government exercised proper prosecutorial discretion in following through in its decision to give the defendant his option of pleading guilty to the pending charges or pleading not guilty and being charged with an additional crime. U.S. v. Allsup, (9th Cir.) 573 F.2d 1141.

SEARCH & SEIZURE

Defendant's act of placing trash in garbage cans which were to be emptied by sanitation department signified an abandonment and no reasonable expectation of privacy by defendant regarding such trash. Thus, seizure of defendant's trash did not violate his Fourth Amendment rights. U.S. v. Shelby (7th Cir.) 573 F.2d 971.

Police officers who saw defendant observe their car, come to a sudden stop, reverse quickly and drive away had reasonable cause to make an investigative stop. The abrupt evasive maneuver upon seeing the marked patrol car gave rise to an inference defendant wished to avoid the police because he was involved in criminal activity. People v. Waits (Colo.) 580 P.2d 391.

Officers who have reasonable cause to believe that an object is itself evidence of a crime, and who seized the object, do not need a search warrant to examine the object to determine its evidentiary value. Applying this rule the California Supreme Court upholds the warrantless search of a van which was the scene of an attempt to molest two young boys. People v. Rogers (Cal.) 579 P.2d 1048.

SPEEDY TRIAL

A twenty-seven month delay of trial on a marijuana possession and distribution charge was held not to be a denial of defendants' right to speedy trial where the trial judge took judicial notice of the crowded docket, the government wished to await a decision on border checkpoint stops which was dispositive of the issues in the instant case and where defendant was not otherwise prejudiced by the delay. U.S. v. Canales (5th Cir.) 573 F.2d 908.

TRIAL

Was proper to conduct a trial in a gymnasium even though death penalty resulted. No showing that trial was conducted in manner not befitting a judicial body. Davis v. State (Ga.) 243 S.E.2d 12.

MARIJUANA - PRIVACY

The Oklahoma Court of Criminal Appeals rejects assertion that home use of marijuana is protected by right of privacy. Cavaness v. State, 23 Cr.L. 2412 (Ok., 1978).

PREVIOUS SEXUAL CONDUCT - REPUTATION

The admission of prosecution testimony to the effect that the male victim of a sexual offense committed by another male had no reputation as a homosexual is proper to rebut the defendant's claim of consent. The introduction of such testimony is not barred by a statute that makes a female victim's "chastity" a forbidden topic in a rape trial. *Locando v. State*, 23 Cr.L. 2400 (Md., 1978).

TRAFFIC STOP - SEARCH AND SEIZURE

There is nothing unlawful in the conduct of a state trooper who looked under the rear seat of a car he had just stopped for a traffic violation. The officer had ordered the car's three occupants to get out after he saw one of the passengers twice reach under the seat as if trying to conceal something. *State v. Brown*, 23 Cr.L. 2406 (N.J. 1978)

HOMICIDE - SEARCH AND SEIZURE - LENGTH OF SEARCH

A search pursuant to a warrant for bloodstained clothing lasting three days because chemical tests were being conducted on the clothing was not unreasonable. *State v. Swain*, 23 Cr.L. 2415 (Minn., 1978).



"Objection! Counsel is badgering the witness!"

APPEAL

Raising one objection at trial did not allow defendant to raise a different objection to the same jury instruction on appeal. The failure to make the specific objection below meant it was waived on appeal. State v. Long (Ariz.) 580 P.2d 1181.

ARGUMENT

Reference in the opening statement to one count of molesting a four year old in a three count indictment was not error although the judge later dismissed that count. The prosecutor had a good faith basis for believing the four year old would be allowed to testify, made no further mention of the count after opening argument, and the court instructed the jury that arguments were not evidence. The reviewing court notes if the defense attorney had made a motion in limine, there would have been no problem. State v. Bowie (Ariz.) 580 P.2d 1190.

COMMENT ON SILENCE

One question about whether defendant said anything after he was read his rights was not reversible error. The court notes that the State should scrupulously avoid any indication the defendant remained silent after arrest. State v. Bowie (Ariz.) 580 P.2d 1190.

CONSENT

Defendant's opening the trunk of his car at a border checkpoint without the officer indicating in any way that the defendant should do so constituted a valid consent to the officer looking inside the trunk. Marijuana, hidden behind a duffle bag which the officer moved to see if anyone was behind, was properly seized. State v. Guerro, (Ariz.) 580 P.2d 734.

DISCLOSURE - POLICE REPORTS

Furnishing copies of officer's reports was sufficient disclosure despite defendant's contention that material evidence was left out of the reports. The state is not required to furnish a word by word preview of the testimony of State's witnesses. State v. Guerro (Ariz.) 580 P.2d 734.

DOUBLE PUNISHMENT

Since there was evidence to support counts of lewd and lascivious acts, and child molesting it was proper to submit both counts to the jury. When defendant was convicted of both, dismissing the lewd and lascivious count after guilty verdicts on both avoided the problem. State v. Bowie (Ariz.) 580 P.2d 1190.

FUNDAMENTAL ERROR

Fundamental error is error which takes away a right essential to the defense or goes to the foundation of the case. State v. Long (Ariz.) 580 P.2d 1181.

JURY INSTRUCTION

Refusing defendant's requested instruction that the jury could not convict unless the victim's testimony was reasonable, etc., was proper since other instructions covered the matter. State v. Bowie (Ariz.) 580 P.2d 1190.

MIRANDA - GOOD LANGUAGE

Defendant plead guilty to first degree murder, then appealed on grounds the detective taking the confession was a friend, an issue waived by a guilty plea. "But, irrespective, ...he is saying that because his Miranda rights were not scrupulously honored he should be given a second chance to escape the punishment which the law exacts for his criminal acts. We do not agree." State v. Bazan (Ariz.) 580 P.2d 721.

PRESENTENCE REPORT

Failure to object to a presentence report which contained a record of some arrests without showing disposition and contained a police officer's recommendation of a maximum sentence waived "any alleged error". State v. Long (Ariz.) 580 P.2d 1181.

WAIVER

Having the defendant, prior to release on his own recognizance, sign a waiver of jury trial in the event he failed to appear is not questioned in State v. Corrales, 580 P.2d 1235.

WITNESSES - CHILDREN

Children's inability to explain the word oath, one believing mother would punish lies instead of God, and the fact one did not mention a second molestation before the grand jury did not make them incompetent to testify where the record showed they knew the truth and would tell it. Contradictions or hazy memory go to weight, not admissibility. State v. Bowie (Ariz.) 580 P.2d 1190.

ARREST

An affidavit based upon the statements of an anonymous victim/eye-witness is inherently reliable and is sufficient to support the issuance of an arrest warrant for defendant. State v. Anonymous (Conn.) 387 A.2d 703.

PAROLE

No right to parole exists in substantive due process and therefore the state needs only a rational purpose for denying it. Protecting society from murderers filled the bill here. State v. Farrow (N.H.) 386 A.2d 808.

COUNSEL - CONFLICT OF INTEREST

The court refused to adopt a per se rule that codefendants choosing to be represented should be advised of possible conflict of interest and other dangers of dual representation, although, the court states that it would be wise for the judge to so advise under those circumstances. United States v. Steele (6th Cir.) 576 F.2d 111.

DRUGS & NARCOTICS

Evidence that defendant telephoned and said he was tied up selling a few pounds of marijuana was properly admitted to rebut entrapment in defendant's trial for distributing cocaine. Whether the drugs are similar is irrelevant, the activity of selling the illegal drugs is the same. United States v. Segovia (9th Cir.) 576 F.2d 251.

In prosecution of doctor for dispensing drugs without legitimate medical purpose, evidence of 5000 other prescriptions for methaqualone written over a fifteen month period was admissible to show that defendant was acting outside the normal course of medical practice and with unlawful intent. United States v. Jackson (5th Cir.) 576 F.2d 46.

ENTRAPMENT

Since proof of predisposition can be made by several methods, character is not an essential element of the entrapment defense. As a result, excluding testimony of specific instances of conduct introduced by defendant to establish his character in a favorable light was proper. United States v. Donoho (9th Cir.) 575 F.2d 718.

INSANITY

Where the government proved beyond a reasonable doubt that the defendant's lack of capacity to appreciate the moral wrongfulness of his act of unarmed robbery was from the combined effects of an organic brain disorder and voluntary intoxication, the only verdict possible was guilty. United States v. Burnam (9th Cir.) 576 F.2d 236.

JUDGES

A judge telling visiting school children during a recess that the defendant was guilty, had a bad record and was going to get the gas chamber as a gift from the local citizens was not reversible error absent a showing that the judge allowed his opinion to influence his rulings. People v. Martinez (App.) 147 Cal. Rptr. 208.

PROBATION - EXCLUSIONARY RULE

Evidence obtained as the result of illegal search and seizure may be used at a probation revocation hearing. State v. Zachary (R.I.) 386 A.2d 1094.

PRIOR CONVICTIONS

Defendant has the burden of persuasion that his prior convictions are invalid, and the fact that the record is silent about the validity of the priors is no basis for holding them invalid. The lack of a transcript from the guilty plea proceedings merely means the transcript was unavailable. State v. O'Neill (N.M.App.) 580 P.2d 495.

ROBBERY

Pointing a gun at each of four tellers in one bank and getting money from each of them constituted four robberies. The legislature intended to punish the threat of violence to a person, and defendant threatened four people. Thus defendant was properly convicted of and sentenced for four robberies. State v. Dillman (Or.App.) 580 P.2d 567.

VICTIMS - SENTENCE

Crimes against people who are particularly vulnerable are "particularly deserving of condemnation." Here an armed burglary of some senior citizens made a high sentence appropriate. People v. Schmidt (App.) 146 Cal.Rptr. 516.

VOLUNTARY ABSENCE - TRIAL

Holding trial without defendant, who was in the hospital, was correct where the defendant was in the hospital because she voluntarily took LSD the night before trial. People v. Cox (App.) 146 Cal.Rptr. 724.

CALENDAR OF EVENTS

September, 1978

- 17 - 21 (NCDA) Organized Crime I - Pittsburgh, Penn.
24 - 29 (NCDA) Prosecutors Investigators School - Quantico,
Virginia

October, 1978

- 4 - 7 (NCDA) Trial Techniques for Prosecutors - Denver, Colo.
29 - Nov. 1 (NCDA) Law & Evidence for the Prosecution Advocate -
San Francisco, California
29 - Nov. 1 (NCDA) Trial Law and Evidence - Palm Beach, Florida

November, 1978

- 8 - 11 FPAA Fall Conference - St. Augustine, Florida
9 - 10 Practising Law Institute Advanced Criminal Trial
Tactics - Chicago, Illinois
12 - 15 (NCDA) Management in the Prosecutor's Office - Atlanta,
Georgia

December, 1978

- 3 - 6 (NCDA) Prosecuting Crimes Against Persons - San Diego, CA
14 - 15 Practising Law Institute Advanced Criminal Trial
Tactics - New York, New York

January, 1979

- 7 - 12 (NCDA) Prosecutor's Office Administrator Course - Part
II - Houston, Texas

February, 1979

- 4 - 8 (NDAA) Juvenile Justice Conference - San Diego, Calif.
4 - 9 (NCDA) Organized Crime - Part I - Los Angeles, Calif.
25 - March 2 (NDAA) Midwinter Meeting - Biloxi, Mississippi



A CRIME OF

Violence

J. H. H. 1978

RAPE

By

MARCH FONG EU*

"Women have had all we are going to take, and now we intend to fight back," says Gloria Allred, Los Angeles attorney and spokesperson for the Los Angeles Chapter of the National Organization for Women. What she is talking about is rape.

According to Allred, "The rising incidence of rape and other sexual assault is of such magnitude that the Bureau of Criminal Statistics has said that if the estimated rape rate of 1972 continued its trend, one out of every 2.8 women in L.A. County, over the age of fourteen will be raped at least once in her lifetime. 1976 F.B.I. data shows that indeed that trend is continuing, if not accelerating, throughout the State."

F.B.I. statistics do in fact provide cause for concern.

From 1966 to 1975, the number of rapes reported to police more than doubled. More than 9,000 rapes were reported in California in 1976 alone. According to the F.B.I. Uniform Crime Report, a full 73 percent of rapists convicted in 1975 had been released from prison or jail within the preceding four years.

California women stand a greater chance of being raped than their east coast counterparts. According to F.B.I. statistics, the chance of a woman being raped in California is almost twice as great as it is in the mid-Atlantic states (New Jersey, New York and Pennsylvania). In 1975, there were 23.6 rapes per 100,000 population in those states, while in California there were 41.6 rapes per 100,000 population.

Various legislators have responded to these statistics by introducing bills to toughen our rape laws, to remove various antiquated stumbling blocks in the path of successful prosecution and to accord rape victims the attention and dignity which is their right. Senator Robert Presley has introduced Senate Bill 709, and Assemblyman Alister McAlister has introduced Assembly Bill 2475, both aimed at lengthening sentences for violent crimes including rape.

Senator Alan Robbins has introduced a series of bills that deal with rape and other crimes against women. The bills include a measure to provide optional self defense courses to junior high and high school teachers (Senate Bill 1710), a measure to extend the Robbins Rape Evidence law which helps to keep the private sex lives of the victims of sexual assault from being openly discussed in court (Senate Bill 1712), and a measure to protect the victim's right to have a person of her choice in the courtroom throughout the trial (Senate Bill 1717).

Both Senator George Deukmejian and Senator Robbins have introduced bills that would restrict the availability of probation as a sentencing option in rape cases (Senate Bill 1476, Senate Bill 1715). Senator Deukmejian is also carrying legislation to broaden the definition of rape to include other similar sexual assaultive conduct (Senate Bill 1640).

Senator H. L. Richardson has introduced a series of bills including one to remove mistaken belief regarding consent as a defense in forcible sexual assault cases (Senate Bill 1843).

Assemblyman Floyd Mori had his measure, Assembly Bill 327, assigned to interim study. Mori's bill would eliminate the distinction between a married woman and a single woman as far as rape laws are concerned.

Assemblyman Eugene Gualco has introduced Assembly Bill 2694, to clarify existing law by declaring that rape, when committed in the course of an otherwise non-sexually assaultive crime, constitutes great bodily injury.

Already this year the legislature passed Assemblyman Daniel Boatwright's Assembly Bill 2075, which removed an outdated requirement that an accused rapist of 14 years old or younger must be proven capable of committing rape by evidence independent of the victim's testimony.

As important as these matters are, the most encouraging sign may not be new legislation, but a shift in public attitude. There was a time when rape victims were considered by many to be somehow different. Persons who were robbed, mugged or beaten, were considered untarnished, but unfortunate victims of violent crimes. In contrast, rape victims were looked on by many as soiled, somehow unwholesome and perhaps even blameworthy. But times are changing.

Juries are now less likely to acquit a rapist by claiming "she was hitchhiking -- any woman who hitchhikes is asking to be raped;" or by saying "she went to his apartment, didn't she? What did she expect?"

There is a growing recognition that fundamental liberty includes the right of a woman to go where she wants by whatever means she chooses and that such a choice is not tantamount to consent to rape.

However, it does not suggest that for women hitchhiking is a good idea. It may be a bad idea; certainly the chances of being raped are increased if a woman hitchhikes. All that is suggested by the public's shift in attitude is that the public is beginning to draw the line between morals and judgment.

Carrying large sums of money, leaving keys in the car, or walking alone at night may be poor judgment. However, no one could reasonably suggest that a person does not have a right to do those things. A person who leaves his or her car is not consenting to have the car stolen.

The public is beginning to realize the rape victim is no different. As women obtain their rightful place as equals among the victims of violent crimes, hopefully the legislature and law enforcement officials will renew their

commitment to reduce the incidence of sexual assaults on women. As Gloria Allred aptly pointed out, rape is the "ultimate obscenity" and as such, the high incidence of this crime is simply unacceptable.

* March Fong Eu was elected Secretary of State in 1974. She was formerly a member of the Assembly from Alameda County, and a member of the Alameda County Board of Education. She holds a doctorate in education from Stanford University and has taught at the University of California San Francisco, Mills College and at the elementary and secondary levels.

THE CRIMINAL JUSTICE SYSTEM



WITH LIBERTY & JUSTICE FOR ALL.

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THE GOLDEN RULE OF
RECIPROCAL PROTECTION
AND RESTRAINT

By

MACKLIN FLEMING*

With rhythmic regularity the evolution of criminal law has followed a common course. To mitigate the impact of punishment in hard cases, criminal procedure becomes complicated and difficult, and the number of criminals prosecuted and convicted declines.

With the resulting uncertainty of prosecution and conviction, deterrence of punishment weakens, and the volume of crime grows. When this growth becomes fully visible, legislators, alarmed by the upsurge in crime, multiply punishments attached to particular crimes in the hope they will terrorize criminals into good behavior. But judges and juries are reluctant to impose punishment disproportionate to the crime committed, with the result that even fewer criminals are convicted, and the deterrent effect of criminal law continues to weaken.

Such was the medieval pattern, and such the European experience in the latter half of the eighteenth century. To break out of this impasse Beccaria and Bentham proposed to soften the substance of criminal law and harden its procedure, thereby making punishment for crime prompt, certain, and proportionate, and restoring balance between crime and sanction.

Substantive criminal law is dominated by the mystical principle that factual guilt is not legal guilt, a notion as sophistical as would be its counterpart that factual innocence is not legal innocence. Different courts and different court systems stumble over one another in assuming jurisdiction in the same cause. Criminal judgment has lost its solemnity and acquired the character of a provisional determination, always

subject to further modification, further revision, further review.

These developments have made criminal adjudication of even the simplest cause inordinately difficult. Fewer criminals are brought to justice. Fewer crimes are solved. Criminal procedure has been complicated to a point of glacial slowness.

The legislative response to criminal law's inability to suppress crime has been the shop-worn response of increased punishment. Predictably, results have been no more satisfactory than in the past. The time has come to heed Beccaria's and Bentham's counsel -- to soften substance and harden procedure and thus bring crime and punishment into balance.

Our inability to make criminal law effective has its roots in a criminal law theory that focuses on the criminal in much the way medicine focuses on the sick. It sees its principal function as the criminal's reformation through programs that treat his sickness to effect his cure.

In centering on the criminal, however, we have lost sight of the deterrent and incapacitative ends of criminal law and its ultimate end of protection of primary right. Along with this loss of vision of our true objective we have to some extent lost belief in the legitimacy of criminal law and become ashamed to recognize it as an instrument of necessary force.

The ultimate end of criminal law is to protect our primary personal rights to life, liberty, property, and security of person against those intentional invasions we identify as true crimes. We make use of the law to incapacitate criminals and deter potential criminals from future crime by teaching the lesson that crime is immoral, impolitic, and unprofitable.

By addressing this lesson to our four audiences of criminal, victim, potential criminal, and potential victim, we seek to inhibit the growth of causal factors in crime -- rational intent, emotional intent, apparent profitability, ability, and opportunity. Each of us belongs to at least two of these audiences, and we must each learn the

lesson that the same law that protects all, restrains all, that only through restraint can we secure protection, for no man is an island unto himself.

The relation between protection and restraint is reciprocal, because we are each simultaneously individual and social member with rights and duties in both capacities. The Law that accommodates our individual needs accommodates our social needs. In the words of Kipling,

As the creeper that girdles the tree-trunk the Law
runneth forward and back--For the strength of the Pack is
the Wolf, and the strength of the Wolf is the Pack.

We perceive criminal law as simultaneous protection and restraint. Our protection as potential victim, our restraint as potential criminal. Under this view the importance of criminal law's restraint lies more in its impact on the millions who never commit crimes than on the thousands who do. If we are wrong in this, then in the words of Justice White, "we should posthaste liquidate the whole law enforcement establishment as a useless, misguided effort to control human conduct."

We are not wrong, however, for once we perceive criminal law's function in true perspective, its immense value as a civilizing influence of mutual protection and restraint becomes clear. Rather than feeling shame for criminal law, we should esteem it as a social contract that protects our better nature against our worse, instructs us not to do to others what we would not have them do to ourselves, and enables us to live under rule of law and not rule of might.

To make criminal law more effective we propose to separate true crime from other public wrongs and develop distinctive procedures for crimes and for public offenses.

We argue that protection against true crime requires effective criminal sanction to impose just punishment. Effective criminal sanction means promptness, proportion, and certainty -- conditions that compel maximum and minimum sanctions. Maximum sanction implies the need for supplemental civil measures for protection against the

demonstrably dangerous criminal. Minimum sanction implies increased use of pardon and clemency to mitigate the occasional miscarriage of justice.

Obviously, criminal law as protection and restraint has no impact on broken families, alcoholic parents, and the lack of parental love; and it can have only minimal impact on inadequate formal education, absence of work skill, unemployment, addiction to narcotics, and lack of social motivation -- factors said to be associated with criminality.

But these social problems fall outside criminal law's sphere of protection and restraint; they must be addressed by other agencies using other techniques aiming at other goals.

Criminal law, to be effective, must concentrate its resources on what it can do best -- protect primary personal rights against intentional invasion, by restraining potential criminals from crime. In so doing, it makes possible quiet enjoyment of our inalienable rights to life, liberty, and the pursuit of happiness.

* Macklin Fleming is a Justice of the California Court of Appeal. He is a former trial judge, assistant United States Attorney and lawyer engaged in private practice.